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Supreme Court of the United States.

OCTOBER TERM, 1934—No. 134.

HARRY SCHNELL and SAMUEL SCHNELL, copartners doing business as H. SCHNELL & Co.,

Petitioners,

AGAINST

The STEAMSHIP VALLESCURA, her engines, &c., LLOYD MEDITERRANEO,

Respondent.

BRIEF FOR RESPONDENT.

Statement of the Case.

The libel herein was filed on December 15, 1925, (R. 1) and sought a recovery *in rem* from the Italian steamer Vallescura of alleged damage to a cargo of onions shipped on that steamer from Spain to New York by Bautista Monton & Co. and consisting of four lots covered by four separate bills of lading as follows: 16,043 crates shipped at Gandia on or about November 5th, 1925, (R. 3), 766 half cases shipped at Gandia on or about November 5th, 1925, (R. 4), 8,957 crates shipped at Denia on or about November 10th, 1925, (*id.*) and 433 crates and 66 half cases shipped at Denia on or about November 10th, 1925 (*id.*). The first and third of the lots above enumerated were alleged to have been shipped to the order of the Chatham-Phenix National Bank & Trust Company, the second and

fourth to the order of the shippers themselves (*id.*) and all to have become the property of the libellants prior to the steamer's arrival at New York (R. 5).

The claim forming the basis of the libel was that on the arrival of the steamer in New York on December 8, 1925, the onions were "not in like good order and condition as when shipped, but short, slack and seriously injured and damaged by and through the negligence of the s/s 'Vallescura', in respect to the loading, stowing, custody, care and proper delivery of the said merchandise, and by and through the unseaworthiness of the said s/s 'Vallescura'" (*id.*).

Lloyd Mediterraneo appeared as the claimant of the Vallescura and filed an answer to the libel (R. 6) on April 16th, 1926, (R. 1). In said answer it denied, among other things, the charge of "negligence" "in respect to the loading, stowing, custody, care and proper delivery of the said merchandise" and the charge of "unseaworthiness" thus levelled against the steamer (R. 7).

The claimant further alleged that it had, for the purposes of the voyage in question, exercised due diligence to furnish, and in fact had furnished, a "seaworthy and properly manned, equipped and supplied" steamer, in keeping with the Act of Congress of February 13, 1893, commonly known as the Harter Act, and that if any of the alleged cargo damage was due to anything happening aboard the steamer it was due to causes from liability for which the said Harter Act relieved the vessel, her owner, officers and crew (R. 8).

As further matter of defense, the claimant alleged that in the steamer's bills of lading it was agreed by and between the carrier and the shippers: That, though the various crates and half cases of onions were externally "in apparent good order and condition", the carrier was without knowledge as to the "contents" and the "condition" of the contents (R. 9); that in no event was the carrier to be liable for, among other things, "decay" of such

"contents" (R. 11); and that, to the extent that the cargo showed damage on delivery at New York, it was damage of a kind that the shippers thus agreed, and were content, to bear (*id.*).

The claimant also, pursuant to Rule XXXI of the Admiralty Rules promulgated by this Court, in connection with and as a part of its answer, propounded various interrogatories to be answered by the libellants upon oath (R. 14). One of these, numbered 8, called upon the libellants to inform the claimant as to the precise nature of the damage, that, according to their claim, affected the cargo on arrival at New York; that is, whether it was breakage, or damage due to contact with salt water or with fresh water, or damage due to heat or to sweating, or whether it was decay damage, or any one of various other types of damage embraceable within the general allegations of the libel (R. 15). These interrogatories, however, the libellants did not answer; although on their taking for their use upon the trial the deposition of Bautista Monton, the shipper, on September 14, 1926, (R. 164), their counsel's attention was called to the fact that such interrogatories had not been answered (*id.*) and the request was then made, particularly with respect to the said 8th interrogatory, that they then, at least in substance, be answered by libellants' counsel, to enable claimant's counsel to conduct a proper cross-examination of the witness (R. 168). The request was declined, however, because, as libellants' counsel stated, he had looked through his papers and found nothing in them that enabled him to answer that interrogatory (*id*).

On the trial, however, it developed that the sole damage complained of by the libellants was "decay". Among other evidence they relied upon to establish the fact of the decay was the certificate of an inspector of the "Federal Horticultural Board" of the United States Department of Agriculture, showing that the condition of the onions when examined by him on December 15, 1925,

was "twenty to twenty-five per cent. decay and sprouting" (R. 72). This certificate further showed under the heading of "Remarks" a notation that it was "A poor cargo" (*id.*).

The libellants also undertook to prove the decayed state of a considerable portion of the onions by Morris Levy, an inspector of customs at the port of New York, who had examined the cargo to determine whether and to what extent there should be a refund of customs duty because of the alleged decay (R. 21, 23). He testified, in part, to the effect that in making his examination he would pick up onions "at random" and that the most of those picked up and examined by him were "slimy beneath the skin" (R. 24). Some of the onions he cut open and in the *most* of those thus examined he found that "they were *pretty* sound in the heart" (R. 25, italics supplied). From this fact he inferred that in the case of the most of the onions thus cut open the decay had started on the outside (*id.*). But, when asked whether he could, as a result of his examination, state what was "the approximate cause" of the decay that he had thus found, he said that he "could only hazard a guess" (*id.*).

Again, he said, "*some* may have had a little bud, but the majority of them were under the skin" (*id.*, italics supplied). As to this "bud" decay he explained his meaning later on by saying that "*some* showed, of course, *the usual decay from the stem of the bud,* most of them were slimy • • •" (R. 30, italics supplied). This witness, in the course of performing his duties as inspector of customs, had during the seven and a half years spent by him in such service, examined on the average, he testified, from "about 50 to 70 cargoes per year" (R. 21-22) and always found some decay in every cargo so examined. "Q. In all the 50 or 75 cargoes a year you do find some decay? A. Some decay" (R. 26).

The records of the Department of Health of the City of New York were also put in evidence (R. 20). They

showed that on the arrival of the steamer this onion cargo had been "ordered overhauled" (R. 24); "cargo discharged Dec. 12, 1925" and "overhaul completed on 22/25"; and that as a "result of overhauling" 3,090 crates and 17½ cases were condemned (R. 20). That is, out of the total number shipped, viz., 25,433 crates and 832 half cases, the total number condemned by the Board of Health, after the onions had been overhauled, was 3,090 crates and 17½ cases; or in percentages approximately 12 per cent. of the onions shipped in crates and 2 per cent. of those in cases.

Some onions, other testimony showed, bore sprouts varying in size up to nine inches in length (R. 117-118); and these merely "sprouting" onions were included, over the objections of the ship's surveyors, in the onions segregated as bad in the general overhauling (R. 118-119).

Harry Schnell, one of the libellants, appeared on behalf of those parties and gave testimony. Among other things he testified that in order to determine whether an onion was diseased or not it was necessary to cut it open; that the test of "merely looking at the onion and handling it" would be insufficient for that purpose unless "it was very badly diseased". He testified: "Q. From your experience of fifteen years, could you tell whether the onion was a diseased onion or a healthy onion? A. Yes, *by cutting it open.* Q. Could you tell it by looking at the onion and handling it, without opening the onion? A. I would, if it is *very* badly diseased I would." (R. 53, italics supplied). And, the same witness testified, disease attacks the onion "in most cases" in that part "where the stump of the onion is" (*id.*).

The testimony of this witness as to the impossibility of detecting the diseased condition of an onion without cutting it open was in all respects confirmed by the sole and uncontradicted expert testimony in the case, viz., that of Leroy A. Matthews, who was an assistant instructor in the Department of Bacteriology and Sanitation in the

Pease Laboratories in New York City and who testified on behalf of the claimant (R. 127). He testified that what the onion trade knew "as a cooked or baked onion", a term that some of the libellants' witnesses had used in describing the decayed onions (R. 25), was "an onion from which the outer scales have a watery, transparent appearance, instead of the usual opaque, white appearance of a healthy, sound onion; the watery transparent appearance is caused by the breaking down of the sound tissue of the onion, due to the effects of bacteria or mould which have gotten into the tissues of the onion, have developed and have subsequently caused the breakdown of the tissue, causing it to be slimy, soft and watery. Frequently in the case of onions you have a growth of mould on the surface. That is the cause of the so-called cooked onion; the word 'cooking' or 'baked' is very loosely used, as I consider it from a scientific standpoint, because it has not been cooked or baked. It has not been subjected to any bacteria which will cause that kind of a deterioration, it is simply the result of bacteria which have been in the onions, presumably at the time they were loaded, the bacteria being present in such small numbers that the destruction had not progressed to an extent which was noticeable to the sense of feel or to the eye" (R. 129).

The same expert testimony showed that it is impossible to have an infection of an onion other than by bacteria entering the onion through the stem at the point where it is cut off when harvested or through bruises then or thereafter received, or by moulds forming on its outside scales and gradually penetrating the same (R. 132, 141). The decay of an onion, this testimony further showed, can occur only from such bacterial or mould action (R. 142) and "it would be impossible for a person to tell whether the onion had bacteria or mould spohrs in it at the time of shipment unless the disease had progressed so that it was obvious" (R. 141-142).

Tests conducted by the witness with a number of Spanish onions, all apparently sound to start with, showed that, when kept in dry air at a temperature of 98° Fahrenheit, they would keep for widely differing periods of time; that some would spoil in 9 days and others be apparently well preserved at the end of 31 days (R. 136-137); that moist air would hasten the deterioration, so as to produce decay of some of the apparently sound onions in seven days, while others, even in such an atmosphere, would keep for a considerable period of time (R. 138); and that the reason for this wide difference in rate of deterioration among the onions of the same lot was, in each case, the relative extent to which they had originally been infected by the bacteria or mould (R. 138).

To show the condition of their onions at time of shipment the libellants offered testimony of the shipper of the onions Bautista Monton, taken by deposition as aforesaid (R. 171). He purchased the onions from farmers (R. 187), who had harvested them between June and September and kept them stored on their farms until sold to the shipper at a time about ten days prior to shipment aboard the Vallescura (R. 186, 194). The shipper conceded that upon the kind of treatment accorded the onions after they had been harvested would depend whether they would "last well or would rot early". "Q. But whether the onions would last well or would rot early would depend largely upon the kind of treatment that they had received after being harvested? A. After being harvested, of course. Any time after being harvested" (R. 187).

And the shipper likewise admitted that he knew nothing whatever as to the treatment that these particular onions had in fact received between the time they were harvested and the time he received them, some ten or twelve days prior to shipment. "Q. Therefore, it would be impossible for you to state where these onions had been stored or how they had been stored between the

time they were harvested and the time they were brought to your warehouse? A. I know nothing about that" (R. 196).

And, although the shipper testified that when he shipped the onions they "looked" sound (R. 180), he also admitted that he did not actually "handle" them (R. 200). The only method that he knew for distinguishing a good onion from a bad onion was "By the look of it and also by the smell (R. 178). His "opinion", thus formed merely from looking at them and observing no bad odor, was that "they were all good enough" for "shipment to the United States" (*id.*); though conceding that if the steamer's hatches had to be kept down for four or five days, the onions would spoil (R. 211).

The only other witness offered by the libellants to show the condition of the onions on shipment was one Joseph M. Gil (R. 62), who claimed, among other things to have seen the onions delivered by lighters from the dock to the steamer and loaded on the Vallescura at Gandia (R. 65, 69); though it elsewhere appeared that he had left Gandia on the 4th of November and was in Barcelona on the 5th on his way to Cherbourg, France, whence he sailed on the 7th (R. 71), and the steamer did not arrive at Gandia until 6:30 in the evening of the 4th and did not commence loading until the 5th (R. 242). And the loading of the Denia onions was not commenced until the afternoon of November 7th (R. 242). In any event, he claimed to have seen no more than a part of the cargo (R. 62), knew nothing about the effect of bacteria in onions (R. 69) and was unable to say whether the onions he had seen in Denia and Gandia were or were not diseased onions (R. 67). "Q. Mr. Gil, from your experience, and from being interested in the Spanish onion business for the last eighteen or twenty years, can you tell whether the onions which you saw in Denia and Granada" (Gandia) "in Spain were diseased onions? A. No." (*id.*).

On behalf of the claimant testimony was offered to show the good character of the stowage (R. 83-86, 111-

117, 217, 219). The steamer's testimony also showed that the steamer, on sailing, was in good first-class condition (R. 215-216, 239), having at least two ventilators for each hold, one forward and one aft (R. 218, 113) and was well manned, equipped and supplied (R. 215, 224, 225, 226, 239-240).

The master of the steamer also testified on direct that the ventilators were open on the vessel's leaving Gandia and Denia (R. 218); that they were thereafter closed "when the weather was bad" (*id.*); that they "were closed so as to avoid the water entering the holds when the weather was bad" (*id.*); also that when "the weather permitted the hatches were left open" (*id.*); that the hatches were open on the vessel's leaving Gandia but on her leaving Denia "closed because of the bad weather" (R. 219); that whenever the hatches were closed thereafter it was "because of bad weather" (*id.*); that both ventilators and hatches "were left open during fair weather, but were closed during bad weather" (R. 220); and that "they were always open during fair weather" (*id.*).

This examination of the master, however, was conducted on written interrogatories before the United States Consular authorities at Genoa, Italy (R. 215), and, in answer to one of the cross-interrogatories, he is represented as having said that in good weather he "opened the *ventilators* in the day time and closed them at night, and in bad weather the ventilators were kept closed at all times" (R. 227 italics supplied); though, in answer to the third preceding cross-interrogatory, he had just testified regarding the *hatches* that "when the weather was suitable they were opened, when the weather was unsuitable they were closed" (R. 226).

The master testified that he had carried two cargoes of onions previously to Montreal and that the ventilating system of the Vallescura was a good and proper one for the necessities of such a cargo (R. 219).

The Vallescura's master further testified that the voyage from Spain to New York was unusual in respect to the time consumed therein (R. 220), the ordinary time for such trans-Atlantic voyage for his steamer, which had a speed of 9 knots (R. 222), being 14 to 15 days (R. 220), whereas on the voyage here involved, from the time the vessel started from Gibraltar on November 14 to the time she arrived in New York on December 5, a period of approximately 21 days had elapsed (R. 243, 245). The onions, of course, were in the steamer for a substantially longer time, the Gandia onions, approximately two-thirds of the whole shipment, for more than thirty-two days, they having been loaded on November 5 (R. 242) and discharged on December 7 and 8 (R. 36, 78, 81), and the balance of the onions for between twenty-six and thirty-one days, they having been loaded at Denia on November 7 and 11 (R. 242-243) and discharged on December 7 and 8 (R. 36, 78, 81).

In respect to the weather, it was shown to have been bad and to have prevented loading at Denia for almost the whole of the seven days the vessel lay there (R. 242-243), thus necessarily curtailing the ventilation of the great bulk of the onion cargo, and to have continued with heavy showers as the vessel started on her voyage (R. 244). On the 22nd, 23rd and 24th days of November the vessel experienced heavy rolling, which, on the 26th, was accompanied with heavy showers, heavy sea and strong pitching (*id.*). On the 27th the wind attained a violent force causing high seas to break on the deck violently and apparently causing a loss of deck cargo. As soon as the weather permitted, the bilges were sounded and an excessive quantity of water found therein. It was concluded that owing to the breaking of the heavy seas on deck water might have entered the holds, damaging the cargo. The wind and sea continued heavy, causing violent rolling and strong vibrations to the hull and steering gear (*id.*). And it did not improve until a time approaching evening on the next day, the 28th (*id.*).

On November 30 showers were again experienced with an agitated sea (*id.*). On the following day there was strong rolling and pitching accompanied by strong winds and the breaking of very heavy seas on deck (*id.*). This condition of the weather and seas continued on the 2nd, when also heavy showers fell and it was observed that the engines were being excessively strained by the rolling and pitching to which the steamer was subjected (*id.*). The same weather and seas continued on the 3rd of December, in the course of which it was discovered on the night of December 2 that extensive machinery damage had been sustained, including a serious fracture of the circulating pump, which seriously interfered with the regular working of the engines, a serious heating of the shoe of the low pressure cylinder, a serious heating of the bearings in the tunnel of the transmission shaft, severe damage to the Weir pump and its connections, a breaking in of the flooring of the boiler room, the collapse of the boiler insulation and other damage to the generator motor and auxiliaries (R. 245). The weather was constantly bad from Bermuda to New York (R. 220) and was without doubt "exceptional" in its severity and duration (R. 223).

The District Court made no express findings of fact, the decision having been handed down prior to the adoption of Rule XLVI ½ of the Admiralty Rules promulgated by this Court. From the District Judge's opinion (R. 247), however, it can be gathered that he found the steamship to have been seaworthy and properly manned, equipped and supplied, and the cargo well stowed within her. It appears therefrom that he found that so far as external appearances went the cargo was on shipment, as recited in the bills of lading, in apparent good order and condition and that on outturn it was in part affected by decay damage. It also appears from his opinion that at least during some of the nighttime the hatches and ventilators of the steamer were closed dur-

ing weather during which they might have been safely left open. He made no finding, however, as to the number of nights, if any, on which it would have been safe to permit the ventilators and hatches to remain open; nor how long on such nights they might have been safely allowed so to remain. But he did find that the time during which they were thus unnecessarily closed, *plus* the time during which they were necessarily closed at night, was a sufficient time for the causing of substantial damage (R. 248). And he further found that any unnecessary closing of them at nighttime was negligence and that for any damage resulting from such unnecessary closing the Vallescura was liable (*id.*).

The District Judge made no finding as to whether the cargo was *in fact sound* at time of shipment; nor as to the *cause* of the damage. Nor did he find that *any* of the damage had in fact been caused by unnecessary suspension of ventilation at night. His ruling simply was, as we read it, that *for* any damage so caused the libellants were entitled to recover.

Accordingly, the interlocutory decree that he thereafter entered (R. 249), instead of directing, as such decrees generally do, that the libellants recover their damages happening by reason of the matters and things alleged in the libel, specifically restricted their recovery to such damage "as was caused by closing the hatches and ventilators at night during good weather" and expressly directed that they should not recover "any damages * * * except such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather" (*id.*). And the case was by said decree referred to William Parkin, Esq., as a Special Commissioner to ascertain whether any and what damage had been sustained by the libellants by reason of that particular cause and to compute the amount thereof (*id.*).

The libellants neither appealed from said decree nor made any move toward establishing or collecting any damages therein for two years and a half thereafter;

that is, until October 21, 1931, when the case was noticed for a hearing before the Special Commissioner (R. 250, 317). Before such commissioner they submitted at a single hearing all of their proofs, which were designed to show not whether any or how much damage had been sustained by their onion cargo as a result of any unnecessary closing of the steamer's hatches and ventilators at night, but simply the total loss resulting from the decay of their onions, regardless of the source or efficient cause of such damage (R. 253-289).

The Commissioner was thereupon, viz., at the close of the said hearing, requested by claimant's counsel to make a ruling upon the point whether the libellants had the burden of proving whether and to what extent their goods had in fact been damaged by the unnecessary closing of the Vellescura's hatches and ventilators at night, or whether the burden was upon the claimant to prove whether and to what extent the libellants damages were due to other causes; the ground of the request being the fact that claimant's witnesses were available, if at all, only in remote foreign ports and that if the burden really lay upon the libellants it would be to impose an unnecessary hardship upon the claimant to require that party to incur the very substantial expenditure of time, effort and money, that would necessarily be incurred in seeking out the witnesses and procuring their depositions (R. 290-291). This request, however, was declined by the Commissioner, who announced that no ruling on the point could properly be made until all of the proofs were in for both parties, and that it was incumbent upon them at their peril to offer in advance of that time all such proofs as might thereafter, in the light of such ruling when made, prove to have been necessary or advisable (R. 291). Claimant's counsel thereupon, without prejudice to that party's position that the burden lay with the libellants and not with the claimant, procured an adjournment to enable him to procure the depositions of the steamer's officers (*id.*).

These further depositions were subsequently taken on written interrogatories as follows: That of Giuseppe Barone, former chief officer of the Vallescura, who had not previously testified in the case, was taken at Genoa, Italy, on September 22, 1932 (R. 307); that of Salvatore Irrera, former second officer of the Vallescura, who had not previously testified in the action, was taken at Messina, Italy, on February 1, 1933; and that of Bartolomeo Dulbecco, former master of the Vallescura, a deposition from whom taken at Genoa, Italy, on June 18, 1928, had been read in evidence on the trial of the merits (R. 215), was taken at Trieste, Italy, on February 4, 1933. The purpose of these depositions was to show that any damage resulting from any unnecessary closing of the steamer's hatches and ventilators approached nullity for the reason that they were never unnecessarily closed. And such was in short their effect.

Barone, the chief officer, testified that when the hatches were closed at night they were always, unless seas were sweeping the deck, so closed that the hatch covers formed a "gabled roof" with a tarpaulin stretched over the top "so that air could circulate without allowing humidity (dew) to penetrate" (R. 309) and that the ventilators were never closed even in bad weather (*id.*). Irrera, the second officer, gave testimony to substantially the same effect, adding that the ventilators were of the mushroom type (R. 304), which, of course, cannot be closed short of being unshipped and plugged. And Dulbecco, the Master, testified to substantially the same effect (R. 299-301), stating that "it was impossible to close" the ventilators (R. 299) and that it was only when "the water came over the deck" that the hatches were "completely closed" (R. 301).

After the foregoing depositions had been put in evidence (R. 295-296), the hearings before the Commissioner were closed (R. 298), without further proofs' being offered by either party.

The Commissioner in his ensuing report (R. 312) ruled that the depositions of the steamer's officers, taken as aforesaid during the pendency of the reference, were not to be considered in determining the extent to which there had been any unnecessary closing of hatches and ventilators at night. He based this ruling upon the express ground that the District Court had made a "finding that the hatches and ventilators were always closed at night" (R. 313). With these proofs eliminated, the Commissioner ruled further that it was "impossible to say how much of the decay was due to lack of ventilation during good weather" (R. 313). He held, however, that the burden under the law maritime was upon the claimant to show to what extent the decay damage was due to other causes; that the unusual and specific provisions of the interlocutory decree were ineffective to shift that burden (R. 312-313); and that, since the claimant had failed to bear such burden, it should be made liable for all of the decay damage, regardless of how the same might have been caused (R. 315).

Exceptions were duly filed to the Commissioner's report challenging all of the foregoing rulings (R. 317). These were subsequently overruled by the District Court (R. 319), whereupon a final decree was entered for the libellants on May 17, 1933, for all of their decay damage in the sum of $15,166.71, with interest from and after that date until paid (R. 320).

An appeal from said final decree was thereafter duly allowed (R. 322) and noticed (R. 321). Error was assigned to the rulings of the Commissioner that had been excepted to as aforesaid, to the ruling of the District Court in overruling the said exceptions and to various rulings of the District Court on its consideration of the merits resulting in the entry of the interlocutory decree, viz., its finding that the hatches and ventilators had ever been unnecessarily closed at night (R. 322), its finding that such action constituted negligence (R. 323), its ruling that such action, even if negligent, was a fault "in

the care and custody of the cargo" (R. 322) and its entry of the interlocutory as well as the final decree in favor of the libellants (R. 324).

The Circuit Court of Appeals found with the District Court that the steamer's hatches and ventilators were unnecessarily "closed some nights in good weather" (R. 328); and that this was negligence in the care and custody of the cargo and not in the management of the ship (*id.*). It found, further, that the necessary closing of the hatches and ventilators during the undisputed rough weather and the delay of the voyage caused thereby were in themselves sufficient to account for "considerable decay" (*id.*); and that the proofs had failed to establish that, by reason of unnecessary closing of hatches and ventilators, any further decay was produced beyond what would otherwise have happened (R. 330). The Court held, contrary to the ruling of the District Court, that since all of the damage was decay damage and, therefore, a kind of damage for which, under the bill of lading exceptions, the claimant was *prima facie* not liable, the burden was upon the libellants, before they could impose liability for such damage upon the other party, to establish that by the exercise of due skill and care the claimant could have avoided the damage; and that they did not bear that burden by merely showing negligence and the possibility that some portion of the damage *might have been* "attributable" thereto (R. 329-330). "Having left the cause of the decay in doubt, the libellants left the ship excused" (R. 330). The Circuit Court of Appeals reversed the decree accordingly.

It is the position of the respondent that the decree of the Circuit Court of Appeals is sustainable on each of the following two grounds: (1) On the ground on which the decision was based in that court; and (2) on a ground rejected by that court, viz., that the fault of the respondent relied upon by the petitioners was a fault in the management of the steamer, not in the care and custody of the cargo.

POINT I.

The onion damage having been decay, the risks of which were under the bill of lading contracts assumed by the shipper, the petitioners were entitled to recover therefor from the respondent only on showing that the carrier could by the exercise of due skill and care have averted the decay.

Apart from special agreement *or statutory limitation* reducing his common law liability, a common carrier is *prima facie* liable for all loss and damage affecting cargo in his custody save only such as results from the Act of God and public enemies. *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 437. Damage due to inherent vice, defect or disease of the thing carried independent of the act of man is included within damage resulting from Act of God, from liability for which the carrier is exempted at common law. *Warden* v. *Greer,* 6 Watts (Pa.), 424; *Nugent* v. *Smith,* 1 C. P. D. 19, 423, 441; *Clark* v. *Barnwell,* 12 How. 272, 282.

The basis of this strict rule of the common law seems to have been presumed negligence on the part of the carrier, which presumption could be overcome only by his showing that the loss was in fact due to the one or the other of those excepted causes. *Forward* v. *Pittard,* (1785), 1 T. R. 27; *Nelson* v. *Woodruff,* 1 Black, 156, 160. And the basis in turn for such presumed negligence on the part of the carrier appears in large part to have been the consideration that the carrier having the goods in its sole custody and possession had the best, if not the only, means of explaining the loss and damage. *Riley* v. *Horne,*

(1828), 5 Bing. 217, per Best, *C. J.; Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, 492.

Such strict common law liability, however, may be reduced by special agreement between the carrier and the shipper, provided only that the agreement is reasonable and not violative of public policy. *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 343, 381-382. The special contract may not relieve the carrier from the consequences of his or his servants' negligence. *Railroad Company* v. *Lockwood,* 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co., supra.* That would violate public policy. But special contracts relieving the carrier from loss or liability for damage that generally happens, or as often as not may happen, without negligence on his part or on the part of any other human actor are deemed reasonable and liberally enforced. *York Company* v. *Central Railroad,* 3 Wall. 107; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427. And particularly is that true of damage developing from within the goods themselves, such as decay. *Clark* v. *Barnwell, supra,* at p. 282; *Railroad Company* v. *Lockwood, supra,* at p. 380; *The Florinda,* 31 F. (2d) 262, 264, (C. C. A. 2d Cir.); *The Toyohashi Maru,* 13 F. (2d) 871, (D. C. S. D. N. Y., Learned Hand, *J.*).

In such case there is no room for the presumption of the common law that the particular kind of damage complained of happened by reason of the negligence of the carrier or that because he or his servants had the goods in their exclusive possession at the time the decay set in they were in any better position than the shipper himself to explain the cause of such decay. It was particularly appropriate, therefore, that in the carriage on long ocean voyages of goods particularly susceptible to decay that the parties should by agreement substitute their own more rational presumption for that of the common law; should agree that in case of decay damage

the same should be presumed to have resulted from causes *other* than the carrier's negligence instead of from that one particular cause of all others. It is not violative of public policy since it does not expressly purport to relieve the carrier from his own or his servants' negligence and since, as was said in *Bank of Kentucky* v. *Adams Ex. Co.*, 93 U. S. 174, 181:

> "It is not to be presumed the parties intended to make a contract which the law does not allow."

Such is the decay exemption clause in the case at bar, viz:

> "3. * * * Contents * * * Condition * * * unknown and not accountable for * * * decay * * * (R. 11, 228A)."

Not only was it reasonable that the parties should have entered into such an agreement, but, indeed, in view of the Spanish onions' high susceptibility to decay, in view of the fact that such decay can only develop from infection by, and rapid multiplication of, bacteria and spohrs operating in mysterious and uncertain fashion upon the inner tissues of the onion and in view of the fact that there is no way of determining whether the onion is so infected or diseased by examining it from the outside until the decay is well advanced, all as shown by the uncontradicted proofs herein (*supra,* 4-8), it becomes at once obvious that for the carrier to have attempted their transportation across the Atlantic under any other sort of an arrangement would have been most unreasonable. And certainly it was at the very least fitting and proper that the carrier's common law insurer risk of decay should be assumed by the shipper and by him placed, if he felt so advised, with an insurance company especially organized and equipped to bear such risks.

The effect of the agreement was, as pointed out *supra*, not to relieve the carrier from any negligence on his or his servants' part; but, instead, in recognition of the patent inapplicability of the common law presumption to the facts in hand, to substitute the more reasonable presumption, viz., that any and all decay damage suffered by the onions in course of transit happened by reason of causes other than the negligence of the carrier or his servants. And so have this and kindred clauses regularly been construed by the great majority of the courts, both state and federal. Once the damage has been shown to fall *prima facie* within the exception, the burden is upon the goods' owner to show, not merely negligence on the part of the carrier, even though concurring negligence, but in addition that such concurring negligence was the *efficient* cause of the loss; *that the loss could have been avoided or prevented by the exercise of due skill and care on the part of the carrier.*

Such was the ruling in the leading case of *Clark* v. *Barnwell*, 12 How. (U. S.) 272, where it was said at page 280:

> "After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show, *that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods;* for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet *if it might have been avoided by skill and diligence at the time,* the carrier is liable. But in this

stage and posture of the case, *the burden is upon the plaintiff to establish the negligence,* as the affirmative lies upon him." (Italics supplied.)

And again at page 282 it was said:

"Now the evidence showing very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship or navigation of the same, or in the stowage, is one of the dangers or accidents of the seas for which the carrier is not liable, the *burden* lay upon the *libellants* to show, *that it might notwithstanding have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods.* For, it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. 12 East, 381; 4 Campb. 119; 6 Taunt. 65; Abbott on Ship. 428, (Shee's Ed.). *But if it can be shown that it might have been avoided by the use of proper precautionary measures,* and that the usual and customary methods for this purpose have been neglected, they may still be held liable. And the same rule applies in the case of damage on account of the humidity and dampness of the ship, which is, more or less, incident to all vessels engaged in trade and navigation, especially upon the high seas. Notwithstanding, therefore, the proof was clear, that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libellants to show, that the respondents *might have prevented it by proper skill and diligence* in the discharge of their duties; but no such evidence is found in the record." (Italics supplied).

It wasn't enough, then, for the petitioners in the case at bar to show that the carrier was negligent, either concurrently, subsequently or antecedently, and that such negligence would alone have been *sufficient* to produce the damage. They were required to do more to rid themselves of the effect of the exception of decay; they were required to show that the carrier by diligence and attention *might have avoided and prevented the decay.* It was incumbent upon them to show that *all other* causes were *insufficient.* The burden upon the petitioners was no other or different from that which would have been upon the carrier in seeking to escape liability for the damage had there been no exception of decay. Such a showing they did not even attempt to make.

To the same effect is *Transportation Co.* v. *Downer,* 11 Wall. 129, where Mr. Justice Field, delivering the opinion for this Court said at page 133:

> "On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for the transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, 'dangers of lake navigation', include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, *might have been avoided* by the exercise of proper care and skill on the part of the defendant. *If the danger might have been thus avoided,* it is plain that the loss should be attributed to the negligence and inattention of the Company, and it should be held liable, notwithstanding the exception in the bill of lading. The *burden* of establishing *such* negligence and inattention rested with the *plaintiff,* but

> the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the *defendant* to *show* that *it* had *not* been guilty of *negligence.* In this respect the Court erred. In *Clark* v. *Barnwell, the precise point was involved,* and the decision of the Court in that case is *decisive* of the question in this. *And that decision rests on principle".* (Italics supplied).

Similarly in the case at bar the petitioners were allowed to recover below in the District Court without having made the slightest attempt to show that the *decay* they complain of *could have been avoided* or *prevented by the carrier no matter how diligent and attentive to its duties it might have been.*

That the test in all such cases is whether the carrier *could have avoided or prevented the damage by diligence and attention* and *not* merely *whether some negligence sufficient to produce some or all of the damage has been proved on its part* is further evident from a still later case of this Court, viz., *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427. In that case Mr. Justice McKenna, in delivering the Court's opinion, said at page 432:

> "The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the *burden of proof* is upon the *defendant* to show, that the fire was *not* caused by *its* negligence or that of *its servants.* The contention is answered in *Clark* v. *Barnwell,* 12 How. 272. In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accidents of the seas and navigation excepted. It was held that after the damage to the goods had been established the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that, even if the damage so occurred, yet *if it might have been avoided by skill and diligence at the time the carrier was liable.* 'But', it was observed, 'in this stage and posture of the case the *burden* is upon the *plaintiff* to *establish* the *negligence* as the burden is

upon him.' *The* doctrine was affirmed in *Transportation Co.* v. *Downer*, 11 Wall. 129. See also section 218 (219) 2 Greenleaf on Evidence". (Italics supplied).

The other Federal Courts have long recognized the same principle, viz., that to defeat such an exception, once the loss has been brought within it, it is incumbent on the cargo owner to show, *not merely* that the carrier has been *negligent* and that such negligence was sufficient to produce some or all of the damage, but that *by the exercise of due care and diligence the carrier could have avoided and prevented the damage.* Thus in *The Isla de Panay*, 292 Fed. 723, affirmed in 267 U. S. 260, Rogers, *C. J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, said at pages 728-729:

> "The general rule is that, where a loss arises from an excepted peril, the ship is *prima facie* excused, and can only be held liable upon *affirmative proof* that some negligence on the ship's part was the *efficient* cause of *the* loss. *Clark* v. *Barnwell*, 12 How. 272, 13 L. Ed. 985. In such cases the ship is discharged, unless convicted of negligence by a *preponderance of proof.* As was said in *The Lennox* (D. C.) 90 Fed. 308, if the cause of the injury is left in doubt, the ship stands excused, for the reason that by virtue of the exception in the bill of lading *the shipper in effect contracts that he will himself stand the risk of any loss arising from the cause named.*" (Italics supplied).

And in *United States* v. *M. Levy's Sons*, 288 Fed. 544, the Circuit Court of Appeals for the Fifth Circuit, by Walker, *C. J.*, said at page 545:

> "Though the damage resulted to the coffee from an excepted cause, yet *if it would have been avoided by the exercise of proper skill and diligence* the carrier was liable. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 165-3; *Clark* v. *Barnwell*, 12 How. 272, 13 L. Ed. 985; *The Glenlochy* (D. C.) 226 Fed. 971. Evidence adduced called for

> the conclusion that, if the stowing and dunnaging of the cargo had been done in a different and entirely practicable manner, *the damage complained of would have been avoided.* * * * The vessel and its owner are liable for damages resulting from a negligent failure so to stow cargo as to protect it from injury by the ordinary contingencies of the voyage." (Italics supplied)

In *Wertheimer* v. *Penn. R. Co.* (C. C. S. D. N. Y), 1 Fed. 232, involving a case of damage by fire, which had been duly excepted in the contract of affreightment, Wallace, *C. J.*, said at page 234:

> "The effect of the contract made between the parties was to impose upon the *plaintiffs* the *burden* of proving that *the* loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark* v. *Barnwell,* 12 How. 272, Mr. Justice Nelson says: 'Although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible *if the injury might have been avoided by the exercise of reasonable skill and attention* on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted on the shipper to show the negligence'. [See syllabus.] In *Transportation Co.* v. *Downer,* 11 Wall. 129, the judgment of the Court below was *reversed* because the jury were *instructed* that it was incumbent upon the *defendant, the carrier,* to bring itself within the exception *by showing that it had not been guilty of negligence.* Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this Court." (Italics supplied).

The same contention, there unsuccessfully urged as it was also unsuccessfully urged in *Cau* v. *Texas & Pacific Ry. Co., supra,* in this Court, viz., that the carrier can have the benefit of the exception only by affirmatively showing that negligence on its part was not the efficient cause of the loss, was successful below in the District

Court in the case at bar and has been urged again upon this Court. Obviously it lacks merit and emanates from a failure to appreciate the significance of the exception.

In *Wolff* v. *The Vaderland,* (D. C. S. D. N. Y.), 18 Fed. 733, Judge Addison Brown dealt with the same problem. At page 739 he said:

> "When the damage complained of is ascertained to be within any of the exceptions of the bill of lading, the *burden of proof* is then *changed,* and the carrier is *not* liable, *unless it be shown by the shippers 'that the damage might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods;* for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty.' *Clark* v. *Barnwell,* 12 How. 272, 280; *The Pereire,* 8 Ben. 301; *Wertheimer* v. *Penn. R. Co.,* 1 Fed. Rep. 232-234; *The Delhi,* 4 Ben. 345." (Italics supplied).

In the case at bar the petitioners made no attempt to show that the carrier by the exercise of reasonable skill and attention to its duties could have *avoided* or *prevented* the *decay* of the onion cargo. The most that they undertook to do, was to show that the alleged failure to keep the hatches and ventilators open at night in good weather was sufficient to cause some or all of the damage. That is far from showing that the carrier could by keeping the hatches and ventilators open at such times or by any other means reasonably within its power have *kept* the onions *from* decaying. Such, however, was the petitioners' burden; and, having failed to bear that burden, they cannot now properly complain of the enforcement of the exception as a valid term of the contract of affreightment.

To avoid the effect of the "decay" exception, the petitioners argue that unless it be construed as leaving the burden on the carrier to prove that the decay did *not*

happen as a result of the *latter's own negligence,* the carrier is in effect *exempting* itself from the effects of *its own negligence,* and, therefore, violating our national public policy. The same argument was urged, but unsuccessfully on this Court in *Cau* v. *Texas & Pacific Ry. Co., supra,* where Mr. Justice McKenna said at page 432:

> "The carrier cannot contract against the effect of his negligence, and *hence* it is contended that in the case at bar the *burden of proof* is upon the *defendant* to show that the fire was *not* caused by *its* negligence or that of *its servants.* The contention is answered by *Clark* v. *Barnwell,* 12 How. 272."

In support of their contention that the burden in the case at bar rested upon the carrier to show that despite certain negligence on its part the decay would have happened in any event, the petitioners cite various cases, none of which, as we read them, support their view. Thus, citing *Maghee* v. *The Camden & Amboy R. R. Co.,* 45 N. Y. 514, 523, they quote a paragraph from the opinion of Andrews, *J.,* at page 11 of their brief, which at first blush appears to support their claim. But an examination of the preceding half dozen paragraphs of the opinion beginning on page 522 show that what the court was there discussing was a case of *deviation,* wherein the carrier lost the benefit of all bill of lading exceptions and became an insurer. Accordingly, when, in the paragraph quoted, Judge Andrews said that "in such a case" the carrier would remain liable for any damage to the cargo unless *he* showed that the damage would have occurred in any event despite such "default, misconduct or deviation", and that "the burden of proof of this fact would be upon the carrier", the learned Judge was referring only to a case of *deviation* or *misconduct tantamount thereto, not* to a case of *ordinary negligence.*

That the rule in a case of *ordinary negligence* is *otherwise* appears from a decision of the same court announced

not more than six months later, viz., *Lamb* v. *Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, 280. There the bill of lading contained an exemption of the carrier from liability for loss by fire. The goods carried were damaged by fire. Proof was submitted on the trial "tending to show negligence of the defendant". The trial judge instructed the jury in effect "that they should find for the plaintiff, unless satisfied, from the evidence, that the fire was not the result of the defendants' negligence" (281), to which instruction an exception was duly taken. The jury returned a verdict for the plaintiff. The judgment entered thereon, after having been affirmed by the General Term of the New York Common Pleas, was reversed by the Court of Appeals, which held the instruction to have been erroneous. Upon this point the Court of Appeals by Grover, *J.*, said, among other things:

"The court thereupon decided, that the burden of proof was on the defendant, to show that the destruction of the cotton by fire was not caused by negligence on its part. This was error. Although in proving the destruction of the cotton by fire, it appeared that the fire originated on a boat of the defendant laying at its dock, this was only evidence tending to show negligence of the defendant. Whether sufficient *prima facie* to entitle the plaintiff to a verdict is a question not necessary to decide, as no ruling thereon was made by the court" (280).

"The court, among other things, charged the jury, that, although the defendant had been free from their ordinary measure of responsibility as insurers, they are not relieved from the burden of satisfying you that this loss, which it is beyond doubt happened by fire, was not occasioned by negligence on its part" (280). "The idea plainly conveyed to the jury was, that they should find for the plaintiff unless satisfied from the evidence, that the fire was not the result of the defendants' negligence, thus leaving them to find for the plaintiff, if unable to determine whether the fire so resulted or not, *while the instruc-*

tion should have been to find for the defendant, unless they found, from all the evidence, that the fire was the result of the negligence of the defendant'' (281). (Italics supplied).

Other cases here relied upon by the petitioners such as *Liverpool Steam Co.* v. *Phenix Ins. Co., supra; The Folmina,* 212 U. S. 354; *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104; *The Edwin I. Morrison,* 153 U. S. 199, and the other cases cited at pages 8 and 9 of their brief; *The Portsmouth,* 9 Wall. 682, and *Corsar* v. *J. D. Spreckels, etc., Co.,* 141 Fed. 260, cited at page 11 of their brief; *The Mohler,* 88 U. S. 230; *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, cited at page 12; *The Mary Belle Roberts,* 22 Fed. Cas. 929, Cas. No. 13,240, cited at page 13; and *The Rona* (1884), 51 L. T. 28, cited at page 15, have no pertinency to the point here under discussion. For they were all cases in which the carrier had failed to show that the damage complained of fell *prima facie* within any bill of lading exception.

The distinction between that type of case and the one at bar is, indeed, pointed out in the very passage of Carver on Carriage of Goods by Sea that is cited by petitioners at page 15 of their brief. The learned author, in Section 78 of the 7th edition of his work, after pointing out in the first paragraph of that section the burden resting upon a carrier to bring himself within a bill of lading exception, if he would escape liability for cargo damage, continues in the following paragraph as follows:

"But in the case of loss apparently falling within an exception, the burden of showing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, has been held to be upon the person so contending."

Once the carrier brings himself *prima facie* within a bill of lading exception, such as fire, breakage, decay or the

like, a task that is not particularly difficult, where as here, the arrived state of the merchandise itself shows the exception to be applicable, presumption can no more be indulged in against the carrier to create liability for that particular type of damage than it could be in the case of a private bailee for hire. *York Company* v. *Central Railroad* (*supra*), 112; *New Jersey Steam Navigation Company* v. *Merchants' Bank* (*supra*), 382; *Lamb* v. *Camden and Amboy R. R. & T. Co.* (*supra*), 278; *Moes Moliere & Tromp* v. *Leith and Amsterdam Shipping Co.*, 5 Sess. Cas. (3rd Series) 988, 991, 992, 996-998; *The Bencleuch*, 10 F. (2) 49, 51-52 (C. C. A. 2d Cir.); *The Ellerdale*, 10 F. (2d) 53, 54 (C. C. A. 2d Cir.).

In that situation, as District Judge, later Mr. Justice Blatchford, said in the case of *The Delhi*, 4 Ben. 345, 7 Fed. Cas. 413, 414, Cas. No. 3770, "not only" must negligence on the part of the carrier be shown, "*but it must be satisfactorily shown that the negligence proved was the cause of the damage alleged*" (Italics supplied).

That precisely is one of the barriers that the petitioners in the case at bar neither did, nor made any attempt to, surmount. They did not show "that the negligence proved was the cause of the damage alleged". They did not show that the damage of which they complained would not have happened just the same, even though the Vallescura's hatches and ventilators had never been unnecessarily closed. They did not show "that it might have been avoided by the use of proper precautionary measures".

The petitioners in the case at bar did not show that their onions were not already infected with bacteria and spohrs and inherently unsound and diseased at time of shipment. And they did not show that the necessary curtailment of ventilation for the period of five or six days at the port of Denia, after the great bulk of the onion cargo was already in the ship, was not sufficient to, and did not, set in active operation the "inherent principle of decay" in all those onions found decayed on arrival at New York.

Nor, apart from that, did they show that the necessary curtailment of ventilation during the six days during which the Special Commissioner found that the steamer's hatches and ventilators "were properly closed" was not sufficient to stir into activity the inherent principle of decay" in all those onions found decayed on arrival at New York. Nor did they show that the prolongation of the voyage by 50 per cent beyond its ordinary duration would not produce the same result.

The shipper himself conceded that if the hatches had to be kept down "for four or five days", "That would be sufficient" to spoil the onions (*supra,* 8; R. 211). By that he presumably meant such onions as were predisposed to decay. That he could not have meant all of the onions is obvious from the fact that, according to the Commissioner's findings, the hatches *and* ventilators were closed tight for a total period of sixteen days of twenty-four hours each *and yet the great majority of the onions arrived undecayed.* If, then, only those onions predisposed to decay were the onions found decayed on arrival at New York and all not so predisposed were found to be sound and in good condition at destination,—and, as the uncontradicted expert testimony in the case shows, there is no other explanation for such a wide difference revealed in the keeping quality of the onions (*supra,* 7; R. 138),—the proofs necessarily left it wholly conjectural whether all of the onions found decayed at New York would not still have been found to be decayed onions, even if there had been at no time any unnecessary closing of the steamer's hatches and ventilators.

A decayed onion is a decayed onion; and presumably would be unmarketable whether decayed little or much. The petitioners might conceivably argue that, even though only those onions decayed that by reason of inherent condition obtaining at port of shipment were susceptible to decay, and even though the protracted necessary and proper curtailment of ventilation might have set off the

process of decay in these onions, still they would not have been decayed *so much,* in the case of any particular onion, if there had been no unnecessary suspension of ventilation at night. But the difficulty with such an argument would be two-fold, viz.: First, there is no proof in the record that a slightly decayed onion would have been of any more value to them than a more extensively decayed onion; and, secondly, the record is quite barren of proof that, once the process of decay has been set off in an onion susceptible thereto, the process can be arrested or stayed by exposing the onion to air. Common experience proves the contrary to be true.

Nor may the petitioners properly contend that, even though the necessary closing of the steamer's hatches and ventilators would have in any event fanned into action the inherent principle of decay in those onions susceptible thereto, nevertheless, because the unnecessary closing of ventilators and hatches at night preceded the necessary closing of the same on the voyage, therefore it is to be presumed that it was the unnecessary curtailment of ventilation at night that in fact initially set the inherent principle of decay to working. Here again the petitioners are met with the difficulty that, if the subsequent necessary suspension of ventilation would have set the inherent principle of decay into action, as they must concede it might have, precisely the same onions would have been found decayed on arrival at New York as those which were in fact so found. And, in that event, the petitioners would have suffered no damage whatever as the result of the unnecessary curtailment of ventilation at night. Moreover, there is no basis in fact for any such argument; since concededly there was a very protracted and very necessary curtailment of ventilation for almost the whole of the onion cargo at the port of Denia before the Vallescura ever got under way.

Under these circumstances there can be, we submit, no question of the soundness of the decision of the Cir-

cuit Court of Appeals in this case. As it observed (R. 329-330):

"as the burden was on the libellants to prove not only that the onions had been damaged, but to prove recoverable damage it was necessary to prove what damage was caused by the negligence of the ship * * * When the problem appears in this form it is apparent that proof of negligence in this connection is not a question merely of showing that the ship did not provide adequate ventilation at all times when the weather permitted, but of showing in addition that the onions were damaged by decay which would not have occurred in spite of inadequate ventilation in good weather. To prove this necessarily required proof which would show what decay 'might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods'. In failing to make such proof, the libellants failed to prove any recoverable damage."

"Having left the cause of the decay in doubt, the libellants left the ship excused."

The rule that, where damage has certainly resulted from a given wrong but is uncertain in amount, he that has caused the damage must be content with an approximation thereof, or, if that be impossible, bear the whole loss (*Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, and the other cases cited in petitioners' brief at pp. 19-22), has no application to the case at bar. That rule applies only where the damages are "definitely attributable to the wrong"; it has no application to "such as are not the certain result of the wrong". *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562-563.

" 'The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such

only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount' " (*id,* 563).

Here there was no damage that was "the certain result of the wrong"; none that was "definitely attributable to the wrong". The uncertainty here was as to source and origin; not merely as to amount. None of it was shown to have resulted "necessarily and immediately and directly from the breach."

The rule, moreover, is inapplicable for a still further reason. Where, as here, an agreement has been made between the parties to the effect that one rather than the other shall be "accountable for" a given kind of damage, which agreement presumably was in part entered into for the very reason of the difficulty normally to be encountered in *accounting for* and tracing such damage in whole or in part to a definite and certain source, the application of the rule would result, not in equity, which it was clearly meant to subserve, but in obvious inequity. It would violate the letter as well as the spirit of the parties' own agreement that the carrier should not be "accountable for" such damage. Where the parties themselves have by agreement fixed the rule to be applied in case of damage of a certain kind, and the same trenches upon no public policy, reason forbids that it should be sacrificed to one that might be appropriate in the absence of contractual relations and provisions.

POINT II.

The fault of the carrier here complained of was at worst a fault in management of ship from responsibility for which the carrier was relieved under the Harter Act.

The respondent satisfied both the District Court and the Circuit Court of Appeals that the Vallescura was "in all respects seaworthy and properly manned, equipped and supplied". It therefore made the point in both courts that, having supplied at the outset of the voyage a perfectly good ship possessing ample and adequate hatch and ventilating appliances, any failure, on the part of the crew, once the ship had gone to sea and their management, as distinguished from the owner's, had begun, to make proper use of those appliances, was at the worst no more than a fault in the management of the ship; and that the respondent was relieved from responsibility for any loss or damage resulting therefrom by virtue of the provisions of Section 3 of the Harter Act (Act of February 13, 1893, c. 105, § 3; 46 U. S. C. A. 192).*

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*In view of the fact that reference hereafter will be made to Section 1 of the Harter Act (46 U. S. C. A. 190), as well as Section 3 thereof, both Sections are here set out in full.

> 1. "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its

The point was ruled against the respondent in both courts. The District Court expressly found that the unnecessary closing of the hatches and ventilators in good weather was negligence "in the care and custody of the cargo" (R. 248). The Circuit Court of Appeals found: "This negligence was related primarily to the care of the cargo and not to the management of the ship. It was, therefore, not an error in management and navigation, but a failure in the performance of a duty owed to cargo from which the ship is not relieved from liability under the Harter Act" (R. 328).

The respondent submits that in so deciding and rejecting the proffered ground of defense both courts gravely erred. Such error, if in fact such it be, is here available to the respondent to sustain the decree of the Circuit Court of Appeals entered below. *Story Parchment Co.* v. *Paterson Co., supra,* 560.

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or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

3. "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, Acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The precise point, viz., whether the unnecessary closing of a steamer's ventilators and hatches in the nighttime at sea, is a fault in the management of the ship, has never previously been before this Court for decision. But this Court has held that the improper use at sea of other of the ship's permanent appliances almost identical with hatch and ventilator covers constituted a fault in management of ship, not in care of cargo. *The Silvia,* 171 U. S. 462, 466.

The parts of the ship mishandled in that case were four round ports on each side of the steamer and about eight or nine feet above the water line when the vessel was fully loaded. Each had a diameter of eight inches, an outer glass cover 5/8ths of an inch thick that was set in a brass frame and an inner shutter of iron. At least one of these appears to have opened directly into the hold in which the cargo of sugar there involved was carried. When the ship left port at the commencement of the voyage the glass covers alone were closed, the iron shutters being left open, since the weather was good and there was then no necessity of having them closed and since the cargo was so arranged in the holds that although the hatches were battened down it would be a comparatively easy task to remove the hatch covers, enter the cargo holds and close the iron shutters when bad weather threatened. To leave the iron shutters open in good weather did not render the ship unseaworthy; but otherwise in heavy weather.

In the afternoon of the day of sailing rough weather developed and the iron shutters should have been at once closed. But the crew neglected that duty, left them open and thus permitted the ship thereby to become unseaworthy for the cargo of sugar in bad weather.

As a consequence of such unseaworthiness in bad weather the glass cover on one of the ports was broken either by the force of the seas or by floating timber or wreckage and since that particular port opened into the hold in which the sugar was stowed the water that sub-

sequently entered through the broken port came in contact with the sugar and damaged it. The cargo owner sued the vessel for this damage.

The ship-owner defended on the ground that the failure to close the iron shutters in bad weather was a fault in the management of the steamer and not in the care of the cargo and therefore was a fault from responsibility for which the carrier was relieved by Section 3 of the Harter Act.

This ground of defense was accepted by Judge Addison Brown in the District Court as sound and determinative of the case. And he dismissed the libel accordingly (64 Fed. 608). In doing so the learned Judge pointed out the close similarity between the iron shutters for the ports and hatch covers on the deck and clearly indicated that the vessel owner would have been entitled to the same relief if, instead of the port covers, the hatch covers had been open in good weather and the crew had negligently failed to close them in bad. He said (608): "The duty to close the iron covers to prevent the breakage of the glass and the ingress of sea water was a duty appertaining exclusively to the 'management of the vessel, which devolved upon the officers of the ship' and the omission to close them was a 'fault or error in the management of the vessel' within the language of the act. *The omission was a fault of precisely the same nature as the omission to put on hatch covers would have been in a rough sea.* By the supply of proper ports, proper glasses and proper iron covers for the ports, *as in the supply of proper hatch covers,* the owner's duty of 'due diligence' was fulfilled; and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the seas from time to time, such an omission seems to me purely a fault 'in the navigation or management of the vessel', for which the owner is not responsible under the recent act." (Italics supplied.)

Judge Brown's decision was affirmed in the Circuit Court of Appeals (68 Fed. 230). The case was then brought to this Court on certiorari and affirmed. Mr. Justice Gray writing the opinion for this Court clearly showed that the reasoning of Judge Brown was approved of. He said (466):

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel, within the meaning of the Act of Congress. They might not include stowage of the cargo not affecting the fitness of the ship to carry her cargo. *But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas;* and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship." (Italics supplied.)

It is not difficult to gather from Mr. Justice Gray's opinion that, if the failure in that case had been a failure, on the coming on of bad weather at sea, to close open hatches with the covers provided for that purpose by the vessel owner or to put on open ventilators the covers similarly provided by the shore management and water had entered through such open hatches or open ventilators into the cargo hold in which the sugar was stowed, the result would have been precisely the same as it was. Indeed, among the English decisions cited and approved of in that opinion was that of *The Ferro,* (1893) P. 38. The actual holding in that English case was against the vessel owner since the damage there complained of was clearly due to bad stowage. The decision, therefore, was not in point for purposes of the decision in *The Silvia, supra;* but the discussion by Sir Francis Jeune, the President, as to what would constitute "management" was very much in point. He there said (45):

"It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is

defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things important to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. *Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation.*" (Italics supplied.)

Nor can it be reasonable to suppose that, if in *The Silvia,* the port covers had been left open in order to furnish ventilation, instead of light, to the cargo compartment, the result would have been any different. Likewise logic forbids, it would seem, that the result should have been any different if the sugar cargo in that case had required ventilation, whenever possible, through the open ports and the crew had, instead of failing to shut the same on the coming on of bad weather, failed to open them on the coming on of good weather and thereby damaged the cargo.

The lower federal courts accordingly in the earlier decisions following *The Silvia, supra,* held that the failure of a crew at sea to close the steamer's ventilators with the covers supplied by the owner was a fault in management and navigation. *The Hudson,* 172 Fed. 1005, 1007-1008 (D. C. S. D. N. Y., 1909). In that case, where the claim was that goat-skins had been damaged by water entering through an open ventilator, it was held by Judge Adams that: "If there was any negligence in the management of the ship on the voyage in failing to cover the ventilators, or remove them and stop the tubes in rough weather, or in failing to keep the scuppers clear, the owner is exempted from liability by the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), having used due diligence to make the ship seaworthy at the outset of the voyage" (1007-1008). He dismissed the libel accordingly.

These decisions were quite in keeping with the contemporaneous trend of decisions in the British courts. Thus in *Rowson* v. *Atlantic Transport Co.*, (1903) 1 K. B. 114, affirmed in (1903) 2 K. B. 666, butter was shipped in insulated chambers connected with a steamer's refrigerating machinery. The machinery was in good working order and the ship in all respects seaworthy at the outset of the voyage, but during the course thereof the crew negligently operated the refrigerating machinery, allowed the temperature to rise unduly in the insulated chambers, and thus permitted the butter to spoil. Kennedy, *J.*, in the Court of Kings Bench, gave judgment for the vessel owner on the ground that the damage was due to a fault in "the management of the ship". The ground of his decision seems to have been substantially as follows: To satisfy his obligation of furnishing a ship seaworthy for the carriage of the butter the vessel owner had to furnish one with proper refrigerating appliances in good working order and capable of carrying the goods safely, apart from excepted perils, to destination. Having supplied such machinery and the ship having sailed, the operation of the refrigerating appliances had to be entrusted to the officers and crew. If, in operating them, they were so negligent as thereby to render the ship unseaworthy for the carriage of the butter, the fault was one in the management of the ship. If proper equipment and other requisites are supplied at the outset so as to render the ship seaworthy for the particular cargo, their improper use thereafter so as to render her unseaworthy for that particular cargo is an error of management.

At pages 116 and 117, after referring to certain authorities on the question of seaworthiness, Kennedy, *J.*, said: "In view of these authorities, it is to my mind clear that the word 'seaworthy' in the section of the Harter Act which is embodied in the bills of lading before me means fit to carry the particular cargo safely in respect of the dangers which but for proper fittings and equipment might damage it during the carriage.

"In the present case, upon the evidence before me, I am satisfied not only that the owners exercised due diligence to make the ship seaworthy in that wide sense, but that she was in fact in all respects seaworthy and properly manned, equipped, and supplied, and that the condition of the section was consequently satisfied.

"But, if the condition of the section would not be satisfied, and if the ship would be unseaworthy at the time of the shipment unless she was fitted with proper refrigerating machinery to keep the butter cool, then if during the course of the voyage she is rendered unseaworthy in respect of the safe carriage of the butter by the negligence of those in charge of the refrigerating machinery, I cannot escape from the logical conclusion that this negligence is, within the meaning of the Harter Act, negligence in the management of the ship of which that machinery is a part. This seems to be in accordance with the language of Gorell Barnes, *J.*, in *The Rodney*" ([1900] P. 112, 117), "where he said 'I think that the words "faults or errors in the management of the vessel" include improper handling of the ship as a ship, which affects the safety of the cargo'."

In the Court of Appeals, where this decision by Kennedy, *J.*, was affirmed ([1903] 2 K. B. 666), Vaughan Williams, *L. J.*, pointed out the close similarity existing between refrigerating appliances to keep cargo cool and ventilating appliances designed to achieve the same result, though in lesser degree. He said (675):

"Now, under those circumstances, if in this case we found that in the refrigerating chambers containing the butter some appliance had been placed simply for the purpose of refrigerating the butter, I should have hesitated very much to say that the refrigerating apparatus was part of the vessel, and I should, I think, not have been able to persuade myself to come to the conclusion that mismanagement of that special apparatus was a misman-

agement of the vessel; but it is not the fact here that this refrigerating machine was introduced into this ship with special reference to this butter. It was, to my mind, no more introduced into this ship with reference to this butter than the *port holes,* or *the removability of the hatches for the purpose of ventilation, or any other ventilating apparatus* could be said to be introduced for the purpose of a particular cargo." (Italics supplied.)

Such was the judicial view as to the inclusion in ship-management, as the term was used in the Harter Act, of the use of the ship's permanent ventilating appliances. Thereafter, at least so far as the lower federal courts were concerned, a conflict of views developed on the point. Thus, although in *Spang Chalfant & Co.* v. *Dimon S. S. Corporation,* 57 F. (2d) 965, 967, the Circuit Court of Appeals for the Second Circuit held that negligence in trimming ventilators so as to catch and convey to cargo such wind as was blowing was a fault in management, the same Court in *Andean Trading Co.* v. *Pacific Steam Nav. Co.,* 263 Fed. 559, reversing the District Court, held that failure to close open hatches with their appropriate covers on the coming on of bad weather, thereby permitting water to enter the holds and damage the cargo stowed therein, was a fault in care of cargo and not of ship-management. In so deciding the court followed a dictum by District Judge Dietrich in *The Jean Bart,* 197 Fed. 1002, 1005-1006 (D. C. D. Cal. S. D., 1911), which the District Court sitting in New York had refused to follow.

The departure from the current of judicial decision thus inaugurated by the dictum in *The Jean Bart, supra,* and followed in the *Andean Trading Co.* case, *supra,* was recognized as such in the former case, where the contrary views expounded in *Rowson* v. *Atlantic Transport Co., supra,* and *The Hudson, supra,* were specially referred to. The vessel involved in *The Jean Bart, supra,* was a French barque, which had undertaken to carry a number of crates of empty "Chianti" wine bottles from Antwerp, Belgium,

to San Francisco. Such bottles are of a distinctive type, being enclosed in wicker or straw covering, and on account of their peculiar shape could not be used for the purpose they were supposed to fulfill without such cover. The voyage consumed a period of five months, and because of the want of adequate ventilation the wickerwork on the bottles heated and decomposed. In the cargo owner's action to recover for the damage so caused, the District Judge held that the ventilating equipment was "very meagre and not reasonably adequate for such a voyage" (1004) and that: "It was the duty of the claimant to see that the Jean Bart was in respect to ventilation seaworthy for this particular voyage and this duty it is thought was not fully discharged" (1005). This initial unseaworthiness of the vessel in respect to her ventilating equipment was, of course, adequate to justify the decree entered for the libellant. And Judge Dietrich's subsequent discussion of whether failure to make proper use of the ship's ventilating appliances at sea was a fault in management of ship or care of cargo was pure dictum.

While recognizing that the views so expressed in this dictum were not in keeping with the views expounded in *Rowson* v. *Atlantic Transport Co., supra,* and *The Hudson, supra,* Judge Dietrich thought they were "not inconsistent with anything said or decided in *The Silvia", supra,* and that they found support in another case that had in the meantime been decided by this court, *Knott* v. *Botany Mills,* 179 U. S. 69. He also referred for support to *The Germanic,* 124 Fed. 1 (C. C. A. 2d Cir.), affirmed by this Court in 196 U. S. 589.

We believe that neither *Knott* v. *Botany Mills, supra,* nor *The Germanic, supra,* lends support to Judge Dietrich's dictum. On the contrary, the former case involved negligence in "stowage" of cargo; the latter, negligence in "delivery" of cargo. Neither was anything said by this Court in rendering those decisions that could properly, we believe, be construed as pointing in the direction of Judge Dietrich's dictum. On the other hand we find that

the opnion in the *Botany Mills* case was written by Mr. Justice Gray, who had also written the opinion for this Court in *The Silvia, supra,* to which case as well as *The Ferro,* approved of as pointed out *supra* in *The Silvia,* he expressly referred as distinguishing between matter of management and matter of mere stowage. Quoting from the remarks of Sir Francis Jeune in *The Ferro, supra,* Mr. Justice Gray said (74) " 'that mere stowage is an altogether different matter from the management of the vessel' " and added:

"The like distinction was recognized by this Court in the recent case of *The Silvia,* 171 U. S. 462, 466."

In *The Germanic,* where the negligence was in the delivery of the cargo, *The Silvia* also was referred to in the opinion written for this court by Mr. Justice Holmes. And, that no doubt was meant to be cast upon the soundness of the decision rendered in *The Silvia,* is quite evident from the remarks of Mr. Justice Holmes, who said (597):

"Nevertheless, in a practical sense, the ship" (*The Germanic*), "was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the court in *The Glenochil*" ([1896], P. 10), "and sanctioned by this court in *Knott* v. *Botany Mills,* 179 U. S. 69, 73, 74, to faults 'primarily connected with the navigation or the management of the vessel and not with the cargo.' [1896] Prob. 15, 19. In the case supposed the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make

it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

There is nothing, we submit, in this language, when construed with reference to the facts then before the court, that tends in the slightest to suggest that mishandling of the covers of hatches and ventilators by the crew of a ship at sea, regardless of the particular purpose that they may have in mind at the time, is ever anything other than a fault in management. The work in course of being done in *The Germanic* was delivery of cargo from the ship to the shore. It was in the course of the doing of that work and with an object to the effectuation of that work that the cargo was so displaced that the ship was rendered unseaworthy, turned turtle and sank. The want of care occurred in no sense in connection with the *transport of cargo at sea.*

A slight consideration of the history of the legislation resulting in the Harter Act reveals, we believe, that Congress never meant by the language used in Section 1 of the act to include therein such want of care of cargo as might occur at sea in connection with *the act of transportation.* As the bill (H. R. 9176) was originally reported out of the House when referred to the Senate the provision regarding care of cargo in Section 1 *did* prohibit bill of lading agreements relieving the carrier from the duty of exercising that particular kind of care, viz., "care in transport" (24 Cong. Rec. 147). The words "in transport" were stricken out in the Senate, leaving the character of care exacted by the section as so amended care generally in respect to those things specifically mentioned, viz., direct dealings with and upon the cargo such as "loading", "stowage" and "delivery". Care "in trans-

port'' was expressly excluded as one of the things to be exacted of the carrier by the statute.

The section as originally reported out of the House and referred to the Senate read: ''That it shall not be lawful for the manager, agent, master or owner • • • to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they, shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care *in transport,* or proper delivery of any and all lawful merchandise'', etc. (24 Cong. Rec. 147, italics supplied).

As amended in the Senate Committee on Commerce, by the omission of the words ''in transport'' (24 Cong. Rec. 1180) and certain other changes not pertinent to this discussion, the section read as set out *supra* (p. 35) (24 Cong. Rec. 1180). And, as so amended, the Bill passed the Senate (24 Cong. Rec. 1181), and went to conference between Senate and House (24 Cong. Rec. 1181). The Senate amendments were thereafter concurred in by the House (24 Cong. Rec. 1291, 1292) and the Bill was accordingly enacted into law without further change (24 Cong. Rec. 1321, 1339, 1603).

It thus appears clear that as the Bill was originally reported out of the House ''care in transport'' was one of the things aimed at, as well as care at the beginning and ending of the voyage, viz., care in loading, care in stowage and care in delivery. At that stage in the development of the legislation there was no purpose, it seems, to draw a sharp distinction between shore management and management of officers and crew at sea, and, while holding the vessel owner strictly liable for negligence in the former, to relieve him from negligence in the latter, so long as he could show that he used due diligence in management ashore. It was in the Senate Committee on Commerce that that new and important feature was worked into the Bill in Section 3 thereof. And it would seem to

be clear that it was because of this new turn given to the Bill in the Senate Committee that "care in transport" was stricken out of Section 1 as one of the objects of the legislation. With Section 3 embodying the new policy that the vessel owner, so long as he had diligently endeavored to supply a seaworthy ship, well manned, equipped and furnished, should no longer be liable for what his servants might do with the same when they proceeded on their voyage and passed out from under his direct control, it was obviously thought that it would be inconsistent, and no longer permissible, to retain in Section 1 "care in transport" as one of the very things from which the owner was not to be relieved.

In the light of this legislative history it would appear, then, that the care of cargo for which the owner was to be held in all events, was care relating particularly to the three sorts of cargo handling specifically named in Section 1, viz., "loading", "stowage" and "delivery"; and that such want of care as might occur at sea in the prosecution of the voyage and in the actual transporting of the cargo was not to be included. Not only is this conclusion necessitated by the striking out of the words "in transport" from Section 1, but such construction of the Act gives it a symmetry and consistency that it would not otherwise possess. Such a construction, indeed, is forecast in *May* v. *Hamburg Gesellschaft*, 290 U. S. 333, 345-346, where this Court, speaking by Mr. Justice Cardozo, has said: "he" (the shipowner) "must do what in him lies by the exertion of due diligence to make the vessel safe and sound. If the management of the ship is in the hands of master and crew, he will be relieved of liability for supervening losses, provided only that his own duty has been fulfilled at the beginning. If the term of management is over and the ship is in his hands again, the duty is renewed.

"*The question then is when management begins and ends.* Iron shutters are left open through the negligence of the crew while the ship is in a heavy sea. Liability for

the damage will not be chargeable to the owner, for this is a fault of management. *The Silvia,* 171 U. S. 462. Upon arrival at a port of call, the master is negligent in his inspection of the ship or its equipment. Liability for the damage will not be chargeable to the owner, for this again is a fault of management. * * * Arrived at distination, the engineer omits to close a valve, with resulting damage to the cargo. Once more, liability for the damage will not be chargeable to the owner, for this again is management. *The Wildcroft,* 201 U. S. 378. One has only to sketch these situations in order to perceive the gap dividing them from that before us here. Here is a case where master and crew have surrendered their management and have made appeal to the owner to resume control himself. * * * *Negligence at such a time is not the fault of servants employed to take the owner's place for the period of a voyage.* It is the fault of the owner personally, exercising his own judgment to determine whether the voyage shall go on."

The distinction, then, sought to be made by the Harter Act in Sections 1 and 3 is a distinction between the management of the owner and the management of the owner's servants. The question is "when management begins and ends" rather than the question, once the servants' management has begun and the ship is plowing the seas, whether the want of care is in respect to the cargo or the "transport" of the cargo or the ship. The act, we submit, neither necessitates, nor permits of, this distinction: That, if the act that the servants were engaged in doing, when negligent, looked to the safety of the ship, the fault is one of management; yet, if, in doing the very same act at another time, looking, however, at such time to the safety of the cargo, and not that of the ship, they are negligent, the fault is not one of management. Yet that is precisely the distinction that is made in the dictum of Judge Dietrich in *The Jean Bart, supra,* followed by the Circuit Court of Appeals for the Second

Circuit in *Andean Trading Co.* v. *Pacific Steam Nav. Co., supra.*

The latter case is, so far as we can find, the only case in which there has been an actual decision drawing such a distinction in the use of hatch and ventilator covers. There is a dictum to the same effect in *The Edith,* 10 F. (2d) 684 (C. C. A. 2d Cir.), a holding on the point having been unnecessary because of the finding of initial unseaworthiness. There is a dictum also to the same effect in *Barr* v. *International Mercantile Marine Co.,* 29 F. (2d) 26 (C. C. A. 2d Cir.). A similar dictum is to be found in *W. T. Lockett Co.* v. *Cunard S. S. Co.,* 21 F. (2d) 191 (D. C. E. D. N. Y.), a ruling on the point having been unnecessary because of the finding that due diligence had not been used to render the ship initially seaworthy. The decision in *The Skipton Castle,* 223 Fed. 839 (D. C. N. D. Cal., 1st Div.), did not touch upon the point since the hatch cover there in question was one not used to protect the ship from the elements but an inner cover designed for use in the hatchway from 'tweendecks to lower hold; and the negligence was apparently a failure in stowage as in the *Botany Mills* case, *supra.*

On the other hand the same Court that in the *Andean Trading Co.* case, *supra,* followed the dictum of Judge Dietrich in respect to the use of a vessel's ventilators and hatch covers, decided in *The Milwaukee Bridge,* 26 F. (2d) 327 (C. C. A. 2d Cir.), and in *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A. 2d Cir.), that failure on the part of the crew to open the hatch covers and make use of the hatches for entry into the cargo hold of a ship to inspect the cargo on suspecting the presence of damage therein and the need of taking steps to prevent its spread is a fault in management. And the same court in *The Merida,* 107 Fed. 146 (C. C. A. 2d Cir.), which in the *Andean Trading Company* case, *supra,* held it to be a fault not in management but in care of cargo to permit water to *enter* through improper use of the *hatch covers,*

held that it *was* a fault in management for the ship's crew *not* to use her *pumps* to *get the water out;* as was also ruled in *The British King,* 89 Fed. 872.

A vessel's pumps are, after all, much like her hatches and ventilators. The former are designed to get water out of the interior of the ship; the latter heated air. And, at the very least, it would seem that consistency would require that, if it is a fault of management not to use the pumps to get the water out of the ship, it is equally so not to use the ventilators to extract the heated air.

There is, we submit, no reason for the confusion, conflict and uncertainty thus prevailing among the decisions of the lower federal courts in respect to the question whether the misuse of a vessel's permanent appliances while she is actually engaged in transport at sea is a fault in management or a fault in care of cargo. Due regard for the broad policy of relief for ship owners embodied in Section 3 of the Harter Act and for the amendment of Section 1 made in committee the better to give effect to such policy, should produce, we submit, a uniformity of decision to the effect that any want of care of the cargo in transport is a fault in the management of the ship; and particularly so where such fault consists in the misuse and mishandling of any of the ship's permanent appliances. The test laid down in *The Germanic, supra,* as that whereby to determine the character of the fault as one of management or care of cargo was, it seems clear, never meant to be applied, except in connection with events occurring prior or subsequent to the transport of the cargo, and where, in connection with the "loading", "stowage" and "delivery" of the cargo, nice questions might often arise as to whether a given fault belonged in the one category or the other; in which case the answer would be found in "the primary nature and object of the acts which caused the loss" (*The Germanic, supra,* 598). With that construction of the rule there laid down, *The Silvia, supra,* is entirely consistent, holding, as it

does, that "navigation" and "management" of a vessel "includes, *at the least,* the *control, during the voyage,* of *everything with which the vessel is equipped* for the purpose of protecting her *and her cargo* against the inroad of the seas" (466, italics supplied).

We submit, therefore, that the decisions in *The Hudson, supra,* and *Spang Chalfant & Co.* v. *Dimon S. S. Corporation, supra,* are to be preferred to that made in the *Andean Trading Company* case, *supra,* and to the dictum in *The Jean Bart, supra.*

But, if the rule announced in *The Germanic, supra,* is to be extended to events occurring *at sea in connection with the transport* of the cargo, and only that use of a vessel's equipment is to be deemed an act of management which is designed to subserve the safety of the *ship* rather than that of the *cargo,* still, it seems clear, for the purposes of the case at bar the result would necessarily be the same. For here it cannot be denied that the fault lay in the closing of the ventilators at night. They were closed *not to save the cargo;* rather *to save the ship* through the sudden coming on of heavy weather in the nighttime and the ingress of water into the ship before the covers could be replaced on ventilators and hatches. The master well knew the importance of ventilation as is indicated by his entry in the ship's log for November 17th (R. 240). When he closed the hatches and ventilators therefore at night it could not be that he was acting in the interest of cargo. It could only be that he had in mind the welfare of the ship as a whole. As the uncontradicted proof put it, it is "the rule to close the ventilators so long as it is safe to do so *for the safety of the ship*".

But, were the question left in doubt as to the precise purpose that the master had in view in so closing the hatches and ventilators, petitioners could derive no benefit therefrom. For, after all, the burden was upon them to

establish negligence on the part of the ship's servants *for which the respondent would be answerable.* Having merely shown an act that might or might not have constituted such negligence, depending upon the primary purpose with which it was done, the petitioners' proof was lacking. To have the act deemed such negligence, it was necessary that they go further and show the *primary intent* that lay behind it.

Accordingly, in the case at bar, it makes no difference in the last analysis whether the rule of *The Germanic, supra,* be extended as the lower court sought to extend it to events occurring at sea in the course of the voyage and in connection with the transport, or whether that rule be construed, in line with *The Silvia, supra,* to apply only to those situations where owner management and servant management rub shoulders, that is, to events connected with the "loading", the "stowage" and the "delivery" of the cargo. In either event the act of the master in covering the hatches and ventilators at night was a fault, if at all, in management, for which the respondent is not in any event answerable in view of its having furnished a "safe and sound" ship, well and properly manned, equipped and supplied.

Finally, it is to be observed that we have not raised the point that the lower courts erred in finding that it was a fault of any sort to close the hatches and ventilators at night. In two very recent cases it has been held by the same District Court that for the master of a steamer to close the vessel's hatches at night is not a fault. *The Tergestea,* 54 F. (2d) 809, 810; *The La Drome,* 43 F. (2d) 241, 242. And in the case of *Adrian* v. *The Live Yankee,* 33 Hunt. Mer. Mag. (1855) 703, 1 Fed. Cas. 187, Cas. No. 88 (D. C. D. Cal.), it was held to be a matter of doubt whether ventilation is or is not of any utility to perishable cargo and whether it might not be dispensed with *in toto.* We have, however, refrained from raising the point here

because of the fact that both of the lower courts have held the suspension of ventilation in this case, though only at night, to have been a fault, and we take it that this Court would not be inclined to go behind the findings so agreed upon below.

POINT III.

The decree of the lower Court should be affirmed.

Respectfully submitted,

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